Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: December 4, 1997
CASE NO: 96-INA-199

In the Matter of:

SEA BOX INC.
Employer

On Behalf of:

REMY QUINTANILLA
Alien

Appearance: Harlan E. Schackner, Esquire
West Orange, New Jersey
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States

who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27(c).

Statement of the Case

On October 7, 1994, Sea Box Inc. ("employer") filed an application for labor certification to enable Remy Quintanilla ("alien") to fill the position of Combination Welder at an hourly wage of $14.00 (AF 69). The job duties are described as follows:

> Welds metal components together to fabricate customized containers and container conversions, such as office units, according to layouts, blueprints and work orders, using a variety of arc and gas welding equipment. Welds metal parts together, using both gas welding and combination arc welding processes as needed. Performs related tasks, such as thermal cutting using plazma [sic] cutter, and grinding. Repairs broken and cracked parts, fills holes and increases and decreases size of metal I.S.O. shipping containers. Positions and clamps together components of fabricated metal products prepatory to welding.
>
> The job requirements are two years of experience in the job offered (AF 69).

On September 18, 1995, the CO issued the Notice of Findings proposing to deny the labor certification. The CO cited a violation of §656.21 (b) (5) which requires the employer to document that the requirements are the minimum necessary for the performance of the job, and that the employer has not hired, or that it is not feasible to hire, workers with less training or experience. The CO noted that the alien had no experience in welding prior to his employment with the employer. The CO stated this finding may be rebutted by: (1) submitting evidence which clearly shows that the alien at the time of hire had the qualifications now required, (2) submitting evidence documenting that it is infeasible to train and hire a U.S. worker, or (3) eliminating the requirement (AF 54).

In rebuttal, dated October 2, 1995, the employer acknowledged that the alien had no welding experience at the time of his hire in August 1992 and that he gained his experience while employed with the employer. However, the employer submitted a sworn statement from Terry Brennan, an operations manager, who stated that it would be impossible to train a new worker because the company no longer possesses the time or personnel to train a Combination Welder. Mr Brennan reported that he trained the alien for the position and that there are no other employees on payroll with the knowledge to train a combination welder. Since the time of the

[1] All further references to documents contained in the Appeal File will be noted as "AF."

alien's hire, Mr. Brennan stated that the company's workforce has expanded the 38% while its volume of business has increased by 43% (AF 57). Finally, the employer argued that since the early 1990s, the shipping container construction industry has become intensely more competitive as a number of large corporations have entered the industry forcing smaller companies out of the business entirely (AF 57).

The CO issued the Final Determination on October 23, 1995 denying the labor certification. The CO found the employer's rebuttal argument unpersuasive and stated that the ability to train U.S. workers is presumed to accompany the type of growth in business income the employer has experienced over the past few years. Subsequently, the employer requested review of Denial of Labor Certification pursuant to § 656.26 (b) (1) (AF 61).

Discussion

The issues presented by this appeal are whether the employer specified the minimum job qualifications for the offered position of Combination Welder pursuant to § 656.21 (b) (5).

Section 656.21 (b) (5) provides that an employer is required to document that its requirements for the job opportunity are the minimum necessary for the performance of the job, and that the employer has not hired workers with less training, or that it is not feasible to hire workers with less training, than that required by the employer's job offer. This section addresses situations where the employer requires more stringent qualifications for a U.S. worker than it requires of the alien, and prevents the employer from treating an alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a/ Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990). It is well settled that an employer violates § 656.21 (b) (5) if it hired the alien with lower qualifications than it specified on the labor certification application, unless the employer demonstrates that it is infeasible to train U.S. workers. *See Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991); *Rosiello Dental Laboratory*, 88-INA-104 (Dec. 22, 1988); *MMMats, Inc*, 87-INA-540 (Nov. 24, 1987). Furthermore, the Board also has held that under § 656.21 (b) (5), an employer may not require U.S. applicants to have the same type of experience that the alien acquired only while working for the employer in the same job. *Central Harlem Group, Inc.*, 89-INA-284 (May 14, 1991).

In this case, the employer argued that it is infeasible to train U.S. workers for the stated position because it would raise the employer's operating expenses. The employer explained that in order to remain economically viable and competitive in its industry, it has been forced to charge the bare minimum for its services while maximizing the use of its existing labor force without making any personnel additions. Thus, the employer contended that it has neither the time or resources to expend on training another worker in light of the competitive nature of its industry.

In *Pueblo Automotive, Inc.*, 93-INA-505 (Mar. 8, 1995), the Board held that labor certification was properly denied where the employer conceded that the alien did not possess the

requisite experience when hired. The employer's assertion that an increase in the volume of business now makes it infeasible to hire anyone with less experience than the employer required was not sufficient to document infeasibility since increased training capability is presumed to accompany growth. *See Super Seal Manufacturing Co.*, 88-INA-417 (April 12, 1989) (*en banc*) (increased training capability is presumed to accompany growth). We find that the case at bar is analogous to *Pueblo Automotive* as the employer acknowledged that the company's volume of sales has increased by approximately 43% since it hired the alien in the early 1990's. We thus hold that the employer has failed to overcome this presumption of increased training capability. *See also Rogue and Robelo Restaurant and Bar*, 88-INA-148 (March 1, 1989) (*en banc*) (the employer's burden of establishing why it is not feasible to provide training to U.S. workers is heavy). Accordingly, we agree with the CO and find that labor certification must be denied.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.